

No. 16,295

In the

United States Court of Appeals

For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appellant's Reply to Appellee's Answer to
Petition for Rehearing**

McCUTCHEEN, DOYLE, BROWN &
ENERSEN

RUSSELL A. MACKEY

BRYANT K. ZIMMERMAN

1500 Balfour Building
San Francisco 4, California

CROWELL, ROUSE & VARIAN

111 Broadway
New York 6, New York

*Proctors for Todd Shipyards
Corporation,
Claimant-Appellant*

FILED

FEB 25 1960

FRANK H. SCHMID, C

No. 16,295

In the
United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appellant's Reply to Appellee's Answer to
Petition for Rehearing**

*To: The Honorable William E. Orr and Oliver D. Hamlin,
Jr., Circuit Judges, and William J. Jameson, District
Judge:*

Appellee's Answer to Appellant's Petition for a Rehearing contains three serious errors which require correction:

1. It is said at page 2 that "it has been common ground to the parties that Todd was claiming * * * negligence of the United States * * * as owner of the *Jeanny* (now

Trojan) prior to her sale * * *.” This is not so. Todd’s claim has always been based solely upon the Government’s liability as vendor. (See, for example, the opinion of the District Court, R. 107, 109, 111-112).

2. The Government attempts to distort Todd’s claim of vendor’s liability into a claim “exclusively upon the non-maritime contract of sale, for breach of warranty” (Answer, p. 4). It then suggests that Todd’s proper course is to dismiss its claim in the limitation proceeding — as well as its other suits, which have been stayed by the Restraining Order! This amazing suggestion overlooks the fact that Todd *cannot* assert its claim of vendor’s liability in any other proceeding until the Restraining Order is lifted to permit it. That Order will not be lifted so long as the District Court remains of the view that a claim for vendor’s liability must be asserted in the limitation proceeding. Clearly an order of this Court is required.

3. The Government then contends that the request for lifting the Restraining Order “has never been presented to the District Court” (Answer, p. 5). This is plainly not so. The motion below specifically asked that relief. The Points on Appeal (R. 155-156, Point 5) and Briefs (See Opening Brief, pp. 2, 7, 11-12, 30) raised the same point very clearly. Indeed, the very basis for the appeal to this Court was the District Court’s refusal to set aside the Restraining Order. (See Opening Brief, Jurisdictional Statement, p. 3.)

Since the Government has now conceded that a claim based on vendor’s liability is not subject to limitation, there can be no reasonable ground for its continuing to try to place procedural blocks in the way of proper assertion of that claim. The claim should be asserted outside of the limitation proceeding. To do this will require that the Dis-

trict Court's Restraining Order be lifted. This Court should enter an appropriate Order to that end.

Dated: February 24, 1960.

Respectfully submitted,

McCUTCHEM, DOYLE, BROWN & ENERSEN
RUSSELL A. MACKAY
BRYANT K. ZIMMERMAN
CROWELL, ROUSE & VARIAN

*Proctors for Todd Shipyards
Corporation, Claimant-Appellant*

